# No. 21939

In the

# United States Court of Appeals

*For the Ninth Circuit*

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SONOCO PRODUCTS COMPANY,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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## Reply Brief for Petitioner

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### I. The Error in the Overturn of the First Election.

Petitioner does not dispute the "wide area of discretion" accompanying the Board's power to determine representation matters. However, the fact that this discretion is broad does not mean that it is unbounded, and it is these limits which concern us here. Thus the discretion must not be exercised unreasonably; it cannot be exercised in such manner as to exceed or conflict with the authority granted by Congress; nor can it be exercised in a way which infringes upon constitutionally protected rights. As discussed in petitioner's opening brief, the Board's treatment of the employer's comments is subject to attack on each of these grounds.

**A. THE BOARD'S TREATMENT OF THE SPEECH WAS AN ABUSE OF DISCRETION.**

In its brief,[1] the Board persists in isolating one segment of one speech and placing upon that segment a harsh and limited connotation. The simple fact remains, however, that the extracted words were part of an entire speech, and that speech was part of a series of speeches. The meaning conveyed by the isolated words cannot be assessed without consideration of the tenor and content of both the remainder of Hughes talk and the other speeches. It is the mandate of the law that the Board recognize the logic of this interrelationship. This it failed to do.

Among the cases cited in the Board's brief only one is remotely analogous to the instant case, and that is an unappealed decision by the Board itself. *Cadillac Overall Supply Co.,* 148 N.L.R.B. 1133 (1964) (Bd. Br., p. 11). However, the situation there presented was that of a company which had become overtly benefit conscious for the *first time* during an organizing campaign, simultaneously announcing an intent to grant a benefit and the necessity to withhold it during the union activity. Such behavior readily lends itself to the inference that the benefit was announced at this particular time merely to afford an opportunity to also announce the necessity that it be withheld "because of the union organizational activities."[2] In contrast, Sonoco had a settled policy of periodically reviewing and increasing benefits, and this was well known to the employees. The

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1. References to the Board's brief are cited Bd. Br.

2. Whether the decision in the *Cadillac Overall Supply* case is consistent with Section 8(c) and with the constitutional guarantee of free speech is a question not pursued here. See the discussion in I. B., infra. The question would be a close one, but the company's timing of the announcement of the proposed insurance benefit might be taken as constituting a promise of benefit in violation of 8(c). The fact that Sonoco's benefit policy was a long standing one precludes a similar interpretation of its remarks.

company did nothing other than call attention to this policy, which it clearly had a right to do, and explain that circumstances prevented the policy's being carried out at the present time, an explanation which the circumstances demanded be made. There is nothing in this course of action to furnish grounds for the adverse motive inferred by the Regional Director.[3]

Significantly, the Board's brief sluffs over the Martin speech without comment. In this speech, made immediately subsequent to the one by Mr. Hughes, the company's wage policy and the present inability to increase benefits were explained in greater detail than in the Hughes' speech, and this was done in terms to which no objection was, or could have been taken. The adverse connotation which the Board seeks to fasten upon the isolated comments cannot by any

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3. The Regional Director's opinion reflects the fact, well-known to all labor lawyers, that the company had one strike against it because it dared to mention benefits in the first place. From this it was an easy step for the Regional Director to isolate certain portions of this discussion and interpret them in a restrictive manner. Apart from the fact that the company's right to comment upon its past benefit policy is well settled, and cannot form the basis for an adverse inference, we also pointed out in our opening brief that the company had little choice but to follow the course it did, i.e. to not grant the usual benefits and explain why. Notwithstanding the Board's pooh-poohing of the problem (Bd. Br. pp. 12-13), the dilemma facing the employer in these cases is a very real one as is readily evident from a study of the Board decisions rendered since *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964). See, in addition to the cases discussed in petitioner's opening brief, the discussion and case citations in Bok, *Regulating NLRA Election Tactics*, 78 Harv. L. Rev. 38, 112 (1964), and Perl, *Granting of Benefits During a Representation Election: Validity of NLRB General Rule*, 18 Lab. Law Jour. No. 11, p. 643, (November, 1967). As a result of the muddle created by the Board's "heads I win tails you lose" approach, an employer cannot help but predicate his decision as to what to do about benefits in substantial part on the very grounds which supposedly are prohibited—the presence of a union on the scene—because that presence forces the employer to prophesize which of its overlapping approaches the Board will choose to apply to his case.

logic of language be said to have any viability in light of the extensive discussion by Mr. Martin. After the two speeches the employees could have been left with only one impression: that the company might violate the law by granting the usual benefits. It is arbitrary for the Board to pretend otherwise.

### B. THE BOARD'S ACTION WAS IN VIOLATION OF 8(c) AND IN EXCESS OF ITS DELEGATED AUTHORITY.

It is enough to condemn the Board's manner of treating the company's statements to note, as above, that this treatment constituted an arbitrary abuse of discretion. However, the Board has raised a further line of argument which cannot be passed without comment. It contends that unless its actions are found to constitute such an abuse of discretion, the actions cannot be challenged because the Board is free to set aside an election solely upon the basis of employer comments which, while they could not form the basis for an unfair labor practice under 8(a)(1) or 8(c), the Board has nevertheless determined somehow interfered with the employee's free choice.[4] In short, the Board's position is bottomed upon the assumption that at the election stage its authority to regulate employer speech is not limited by the provisions of 8(c),[5] or by constitutional provisions of

4. Bd. Br., p. 13, n. 7. The Board refers to Mr. Hughes' "conduct", but it cannot by this semantic device alter the obvious fact that the election was overturned solely upon the basis of the *content* of the Hughes speech.

5. The text of 8(c) is set out in petitioner's opening brief at p. 10, n. 7. It should be noted that neither the Regional Director nor the Board has suggested that the objected to statement might qualify as a "threat" or "promise of benefit" under that section. It is, of course, apparent that the statements are neither. Their unobjectionable nature is well documented in the cases cited in our opening brief. See *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F.2d 640 (2nd Cir. 1962) and the other cases cited on pages 10-12 of petitioner's opening brief.

analogous proportions, but extends to any speech which the Board, in its broad discretion, decides might interfere with its "laboratory conditions." So far as we are aware this contention has never received judicial sanction.[6]

The Board's contention can better be assessed by first recalling the background against which section 8(c) was enacted. The Board had adopted what Congress thought was an overly restrictive view towards the employer's right of speech during election campaigns. *N.L.R.B. v. Spartan Manufacturing Company,* 355 F.2d 523, 524 (7th Cir. 1966). The cases were replete with instances where the Board ordered the employer to cease and desist from making certain statements, almost to the point of imposing absolute neutrality upon the employer, and to correct this 8(c) was enacted "to recognize and define the rights of both employers and unions to free speech as guaranteed by the First Amendment." *N.L.R.B. v. TRW-Semiconductors, Inc.,* 385 F.2d 753, 755 (9th Cir. 1967). It was thought that the best guarantee of a free and informed choice by the employees was a healthy flow of information from each of the competing interests:

> "The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of

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6. As for the cases the Board cites in support of its proposition: One involved a threatening speech illegal even under 8(c). *N.L.R.B. v. Clearfield Cheese Co.,* 322 F.2d 89 (3rd Cir. 1963). Another did not involve speech at all, but an actual grant of benefits. *N.L.R.B. v. Tennessee Packers, Inc.,* 379 F.2d 172 (6th Cir. 1967). In a third the only issue involved was a limited one as to the jurisdiction of the federal district courts. *Greenboro Hosiery Mills, Inc. v. Johnston,* ..... F.2d ....., 65 LRRM 2299 (4th Cir. 1967). And in the remaining two the question before the Courts was not whether the *content* of certain speeches was objectionable, but whether the employer engaged in interfering *conduct* by making *a* speech (regardless of its content) a very short time before the election. *Foreman & Clark, Inc. v. N.L.R.B.,* 215 F.2d 396 (9th Cir. 1954); *N.L.R.B. v. Shirlington Supermarkets Inc.,* 224 F.2d 649 (4th Cir. 1955).

> the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial but there is a limit. We conclude that Congress set the limit in § 8(c) . . . ." *Southwire Company v. N.L.R.B.*, 383 F.2d 235, 241 (5th Cir. 1967); quoted in substantial part in *N.L.R.B. v. TRW-Semiconductors, Inc.*, supra at 760.

Though the Board would have it otherwise, it is apparent that in the instant case it has acted contrary to both the spirit and the letter of this section. Here it voided an election *solely* upon the basis of certain employer statements which were well within the protected area of speech marked out by 8(c). It then found the employer guilty of an unfair labor practice because the employer refused to bargain on the grounds that the election was not rendered invalid by reason of the speech. In other words, though the employer's speech was not itself declared to be an unfair labor practice, it formed the gravamen for the finding of such a practice. It was precisely to prevent the Board from perverting the intent of the section by resort to such circumventions that Congress caused its language to read that protected speech "shall not constitute *or be evidence of* an unfair labor practice . . . ."

While in the instant case the Board has run itself afoul of the express provisions of 8(c), its contention as to its right to proscribe speech during election compaigns is open to even broader cirticism. In enacting section 8(c) Congress drew the boundary between that speech which is constitutionally protected and hence, by definition must remain unfettered, and that which is unprotected and therefore subject to restraint. The enactment of the section was also an expression of Congressional belief that the purposes of

union elections could best be achieved by allowing full play to speech short of that prohibited by 8(c). Yet here the Board contends that it nevertheless has the right to restrain such speech by the expedient of labelling it "conduct" which interferes with the employee's free choice, rather than an unfair labor practice, and overturning elections in which it appears.

Stated baldly, this is an assertion that the Board's view as to the circumstances under which elections should be conducted, as embodied in its definition of what constitutes "laboratory conditions", should, in the event of conflict, prevail over Congress' views on the same subject.[7] This is something like the cart pulling the horse. The Board has no authority other than that given it by Congress, nor any independent right to make policy. It must exercise its administrative discretion in a manner consistent with the Constitution, with the boundaries expressly or impliedly defined by the legislature, and with the policies enunciated by that body. In section 8(c) Congress has declared the point at which free speech begins. For the Board to restrain that speech, under any guise or in any manner, is by definition an infringement upon the right in violation of both express legislative policy and the constitutional guarantee itself. See the dissent by Justice Soper in *N.L.R.B. v. Shirlington Supermarkets, Inc.,* 224 F.2d 649 (4th Cir. 1955).[8]

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7. The Board's test for its "laboratory conditions" is whether the act (or, according to the Board's present contention, speech) was "calculated to interfere with the employees' free choice". Of course almost all speeches given by an employer are calculated to do just that; they are meant to criticize the union and laud the employer's policies in an attempt to convince the employees to vote against unionization. Yet it is on the basis of this vague, but stringent test, bottomed primarily upon the Board's unreviewable discretion, that the Board would rest the employer's right of free speech.

8. This dissent, while perhaps somewhat misplaced under the facts of that case where the content of speech was not in issue, is

It is submitted therefore that the Board's actions with regard to the first election are thrice condemned: (1) because the Board construed the company's speeches in a narrow, unreasonable and arbitrary manner; (2) because the Board used speech protected by 8(c) as evidence of an unfair labor practice; and (3) because, in any event, the Board has acted in excess of its authority in restraining commentary which Congress and the Constitution declare should be permitted.

## II. The Erroneous Treatment of the Objections to the Second Election.

On this topic the Board spends some time explaining why there was an absence of conflicting evidence. In support it cites various cases, in each of which the facts either were not disputed or, if they were, did not form a basis for setting aside the election even if taken as establishing the objecting party's contentions. We do not dispute that if this case fell into one of these categories it would be within the Board's authority to refuse to afford a hearing. What we do dispute, however, is the Board's facile method of determining whether or not factual issues exist. We also dispute the Board's shrugging aside as of no importance certain errors of law committed by the Regional Director.

Under the helping hand of counsel for the Board, the Regional Director's second supplemental decision achieves a breadth it lacked in the original. For instance, we learn that the Director refused to consider the undenied threat

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precisely on point in the instant case. The point made by the dissent is much the same as that made above: If certain speech has been declared immune by constitutional and Congressional mandate, the Board should not be able to restrain it by the semantic expedient of calling it something other than an unfair labor practice and resorting to its self-fashioned administrative remedy of directing a new election to prohibit it.

made to Mr. Mendonca, because in the director's "judgment" any coercive impact which the threat might otherwise have had could be presumed to have dissipated (Bd. Br., p. 14). The fact is, as is evident from a reading of the decision, that the Regional Director dismissed the threat out of hand as of absolutely no legal significance. Its possible continuing impact on the employee involved and the other employees who witnessed the incident was not explored by the investigating agent nor considered by the Director in his decision. As the threat occurred on the day of the first election it is within the ambit of *The Singer Company*[9] doctrine. The fact that it occurred at the beginning of the period which that doctrine says must be considered does not afford any justification for the Regional Director's complete refusal to concern himself with it, and its possible lingering effects. See, *Weather Seal, Inc.*, 161 NLRB No. 105, 63 LRRM 1428 (1966), and cases cited at pages 14 and 16 of the Company's opening brief.

The company contended that this threat was reinforced by subsequent telephone calls. In its brief the Board denies this is so and in support of this denial recites the unilateral "findings" of the Regional Director (Bd. Br., p. 15). It suggests the matter was settled by the employee's inherently ambiguous statement that the matter "had been cleared up and he was no longer afraid." In so reasoning the Board ignores the fact that these supposedly undisputed findings necessarily contradict the employer's sworn testimony that Mendonca had expressed a continuing fear *after* the telephone calls had been made (R. 88).

Board counsel continue to rewrite the Regional Director's decision in the discussion of the Scroggins incident (Bd. Br., pp. 16, 20). We are told that the employee's conflicting state-

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9. 161 N.L.R.B. No. 87, 1967 CCH NLRB para. 20,874, 63 LRRM 1381 (1966).

ments as to what he was told were treated by the Regional Director as "immaterial", and the objection dismissed solely because there was no evidence that the union agent had "misrepresented" the foreman's attitude. However, the Regional Director's opinion reflects a number of things to the contrary (R. 45). For one, the Regional Director's opinion recites the employee's denial of the threat without mentioning his earlier conflicting statement, and it is obvious that the assumed truth of this denial contributed substantially to the Director's conclusion that the company's objection was lacking in merit. This ex parte crediting of the evidence is sufficient in itself to invalidate the Regional Director's decision.

Furthermore, that decision states only that the foreman made "certain complaints" about the employee, without specifying just what those complaints were. If the complaints did in fact amount to an expression of a desire to see the employee fired, the Regional Director would certainly include this pertinent bit of information in his opinion. Finally, the Regional Director's phraseology was that there was no evidence that the foreman's attitude had been *"substantially misrepresented"* to the employee. This is obviously something short of a finding that the foreman's attitude was what the union agent said it was, and when accompanied by the unrevealing assertion that *"certain* complaints" had been made, it leaves the entire issue beclouded. The foreman may have complained of any number of things which would not furnish sufficient justification for a union representation that he was out to get Mr. Scroggins fired.

In short, the last three sentences of this paragraph of the Regional Director's opinion contain nothing but conclusionary statements. Not one objective fact is set forth.

The factual conflict is sluffed over by an evasive shroud of words which skirt the basic issue, and reject the employer's objection without coming to terms with it.

As for the Gonzalez incident, it is not the hullabaloo surrounding his presence on the voting scene standing merely alone which is significant, but that presence superimposed upon the other interfering factors. *Home Town Foods, Inc. v. N.L.R.B.,* 379 F.2d 241, 244 (5th Cir. 1967). In an election decided by an extremely close vote, this incident in conjunction with the threats would certainly have compelled a finding that the Board's "laboratory conditions" had been undermined. *General Shoe Corporation,* 77 N.L.R.B. 124, 127 (1948); *Neuhoff Brothers, Packers, Inc. v. N.L.R.B.,* 362 F.2d 611 (5th Cir. 1966).

In the overall context, "substantial and material" issues were presented not only as to the factual conflicts above outlined, but also as to the interrelationship of the various incidents and their actual and potential effects on the voters. *Cf. Home Town Foods,* supra. The Regional Director's unilateral resolution of factual conflicts, his refusal to give certain incidents the legal significance to which they were entitled or to come to terms with others, his failure to consider the interrelationship and cumulative effect of the various incidents, and his refusal to afford a hearing where each of these factors could be explored and resolved, all conjoin to invalidate the action taken on the objections to the second election.

### III. The Summary Finding of an Unfair Labor Practice.

In our opening brief we contended that the Board's consistent refusal to grant a hearing, even though some pertinent facts were in dispute and others had not been afforded their full legal significance, precluded an entry of sum-

mary judgment at the unfair labor practice stage. While this in itself would suffice to require reversal here, we also outlined certain other considerations in an attempt to demonstrate just what is involved when the Board resorts to the summary judgment device in a case such as this one, and why its use should be closely scrutinized by the courts. In this connection we contrasted the courts' strict approach to this device, on the one hand, with the situation pertaining when the Board treats as conclusive in a later unfair labor practice case "determinations" made via its loose, ex parte procedures applicable at the post election stage.

Though the Board persists in focusing upon the post election procedures (Bd. Br., p. 21), it was not just the post election hearing which was here foreclosed, but also a hearing on the unfair labor practice charge. As to the latter, the Congressional mandate embodied in Section 10 (b) is that the defendant is entitled to a full hearing on all issues, not, as the Board would have it, that defendant is to be afforded such a hearing only when he can discharge a burden of "clearly showing a need" for it. To the extent the summary judgment device has any application in such administrative hearings, the courts have treated it as subject to circumscriptions analogous to those applying to its use by the judiciary. *Kirby v. Shaw,* 358 F.2d 446 (9th Cir. 1966); *Neuhoff Brothers, Packers, Inc. v. N.L.R.B.,* 362 F.2d 611, 613-14 (5th Cir. 1966).

The Board's gross departure from these standards cannot be justified by any of the factors it advances. The Board points to its investigative machinery, which it generously characterizes as "impartial", as supplying a fact finding procedure not available to the federal district courts. While it may be the Board has a mechanism for investigation, it is also true that this machinery permits

the facts to be explored and determined *sub rosa,* and this hardly seems a sufficient substitute for the broad and open access to proof, through affidavits and discovery, which parties enjoy under the federal rules. 6 Moore, *Federal Practice,* sec. 56.15(5), p. 2391. Nor has Congress expressed any desire to eliminate "time-consuming formal proceedings." Quite to the contrary, it has explicitly provided that a party is not to be found guilty of an unfair labor practice without being furnished all the safeguards of a full and open hearing. For the Board to suggest otherwise is only another variation of the oft rejected theme that "it is more expeditious not to recognize rights." *N.L.R.B. v. Trancoa Chemical Corporation,* 303 F.2d 456, 462 (1st Cir. 1962).

Finally, we are told that the courts' reluctance to grant a summary judgment is bottomed upon a concern for the constitutional right to jury trial. But courts faced with such motions never express concern over whether or not a jury has been requested in the case or, indeed, whether or not the case is an appropriate one for a jury; nor do litigants offer these facts for the courts' consideration. What the courts do consistently express is their awareness that a grant of summary judgment deprives the party of his day in court and subjects him to a judgment without the safeguarding procedures which accompany a trial, jury *vel non. Lane Bryant v. Maternity Lane, Ltd. of California,* 173 F.2d 559, 565 (9th Cir. 1949); and see 6 Moore, *supra,* sec. 56.06, p. 2075.

If the numerous factual and legal issues surrounding the elections had come before the Board for the first time at the unfair labor practice proceeding, and if at this point the Board had conducted a private investigation, resolved the issues in an ex parte manner as did the Regional

Director and thereupon summarily found an unfair labor practice, its actions would be consistent neither with the statutory provisions nor with the requirements of due process. We fail to see by what alchemy the Board's actions in this case are rendered lawful merely because this same result was accomplished in three steps instead of one. We submit they were not; that the case should be remanded for a hearing wherein the issues can be fully and fairly determined.

## CONCLUSION

It is respectfully submitted that the Court should refuse to enforce the Board's Order and either affirm the validity of the first election or remand for the required hearing.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. Judge Elderkin